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Nos. 91-10 and 91-32

In The

Supreme Court of the United States

October Term, 1991

SPECTRUM SPORTS, INC., ET AL.,

Petitioners,

v.

SHIRLEY McQUILLAN and LARRY McQUILLAN dba SORBOTURF ENTERPRISES,

Respondents.

SORBOTHANE, INC., ET AL.,

Petitioners,

v.

SHIRLEY McQUILLAN, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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14

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. THIS COURT SHOULD NOT REVERSE OR REMAND TO CORRECT TECHNICAL ERRORS IN THE UNPUBLISHED NINTH CIRCUIT OPINION 2

III. A PARTIAL SUMMARY REVERSAL BASED ON *COPPERWELD* WOULD HAVE NO EFFECT ON THE DISPOSITION OF THIS CASE 3

IV. NO PURPOSE WOULD BE SERVED BY A REMAND OF THIS CASE TO THE NINTH CIRCUIT FOR ANOTHER RECONSIDERATION OF *ATLANTIC RICHFIELD* 7

V. THE BRIEF OF THE UNITED STATES CORRECTLY CONCLUDES THAT THE ALLEGED *LESSIG* ERROR JUSTIFIES NEITHER REMAND FOR REVERSAL 10

VI. CONCLUSION 10

TABLE OF AUTHORITIES

Page

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) 1, 2, 7, 8, 9, 10

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 1, 2, 3, 4, 5, 10

Datagate, Inc. v. Hewlett-Packard Co., 941 F.2d 864 (9th Cir. 1991) 9

Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.) cert. denied, 377 U.S. 993 (1964) 2, 10

Oahu Gas Service, Inc. v. Pacific Resources, Inc. 838 F.2d 360 (9th Cir.), cert. denied, 488 U.S. 870 (1988) 10

Respondents Larry and Shirley McQuillan file this brief in response to the brief of the United States as Amicus Curiae.

I

INTRODUCTION

Respondents agree with the conclusion of Amicus Curiae that this Court should not grant certiorari of the unpublished decision of the Ninth Circuit. However, in addition to recommending against a grant of certiorari, Amicus Curiae invites this Court to consider granting either a partial reversal on the *Copperweld* issue or remand for the Ninth Circuit Court of Appeals to again reconsider its decision in light of *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990). The United States' suggestions, particularly when considered in light of its discussion at pages 12 through 17 of its brief, seem lukewarm and provide no explanation of how further review by the Ninth Circuit will serve any purpose. Respondents suggest that the United States' brief itself establishes why this Court should simply deny certiorari and allow this litigation to finally conclude nearly eight years after the complaint was filed. Respondents also believe that certain critical points are either unclear from the brief of the United States or are omitted entirely. Therefore, Respondents file this brief to make or clarify these critical points.

The United States also criticizes the Ninth Circuit's *Lessig* instruction but seems to acknowledge that no purpose would be served by a remand to the Ninth Circuit for further review on this issue. The *Lessig* rule has been

part of Ninth Circuit antitrust jurisprudence since 1964. This Court has declined several recent opportunities to review this doctrine in published cases. In any event, as the United States correctly points out, reversal on this issue would not affect the outcome since the Sorbothane petitioners were also found liable on two Section 1 counts and as to both petitions, there was evidence to support alternate Section 2 counts not based on the *Lessig* presumption. (Amicus Curiae brief at p. 16.) The treble damage award is supportable on any of these alternate Sherman Act claims as well as the multiple RICO counts that are not the subject of either petition.

II

THIS COURT SHOULD NOT REVERSE OR REMAND TO CORRECT TECHNICAL ERRORS IN THE UNPUBLISHED NINTH CIRCUIT OPINION

The Ninth Circuit issued a Memorandum Decision which has no impact on anyone other than the parties. It bears emphasis that Respondents prevailed on each and every antitrust claim as well as all RICO and state law claims. As discussed below, neither the correction of alleged *Copperweld* error nor the failure of the Ninth Circuit to specifically mention *Atlantic Richfield* will change the outcome of this case. No purpose is served by further delaying this case so the Ninth Circuit can, once again, consider the arguments raised by petitioners and possibly "clean up" its opinion.

III

A PARTIAL SUMMARY REVERSAL BASED ON *COPPERWELD* WOULD HAVE NO EFFECT ON THE DISPOSITION OF THIS CASE

The United States concludes the District Court erred, under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), by instructing the jury that subsidiaries of a common parent are capable of conspiring. However, the United States also recognizes that Petitioners presented *no evidence* on the relationship between the purported affiliated entities that engaged in the horizontal market allocation, including whether they were owned by a common parent. (Amicus Curiae brief at p. 13-14.) This Court should not vacate the decision and reverse based on an erroneous *Copperweld* instruction where the evidence would not have supported petitioners request for any instruction on the *Copperweld* defense.

More importantly, a remand to correct this error would not change the outcome. There were two separate Section 1 verdicts, for horizontal market allocation and resale price maintenance. While the United States suggests "it is difficult to determine whether the *Copperweld* error infected the Jury's verdict on the resale price fixing claim," (Amicus Curiae brief at p. 14, n. 11) in fact, the record is clear that the resale price fixing verdict was based on a finding of agreements that necessarily included non-affiliated corporations. For two independent and sufficient reasons, any error in the *Copperweld* instruction could not have affected, whatsoever, the jury's consideration of the resale price fixing claim.

First, the *Copperweld* instruction itself prevented the jury from finding an agreement exclusively between members of the BTR, Inc. family of corporations as the requisite Section 1 contract, combination or conspiracy. The corporate defendants found liable on the resale price maintenance claim were Hamilton Kent (the original Sorbothane manufacturing subsidiary of BTR, Inc.) and Sorbothane, Inc. (the subsidiary later created by BTR, Inc. to take over the manufacture of Sorbothane from Hamilton Kent.)[1] Both were entirely owned ultimately by BTR, Inc., which was found liable for resale price maintenance as the alter ego of Hamilton Kent and Sorbothane, Inc. BTR, Inc. was never a manufacturer of Sorbothane and neither Sorbothane, Inc. nor Hamilton Kent was ever a distributor to BTR, Inc.

The *Copperweld* conspiracy instruction provided:

> "A conspiracy cannot be found to exist between a corporation and its own agents and/or employees, nor can a conspiracy exist between a corporation and its unincorporated divisions or *its wholly-owned subsidiaries*. Conspiracy may be found to exist, however, between a corporation and other persons or independent corporations." (Emphasis added).

The instruction then explains the circumstances under which a conspiracy may exist in other affiliated corporation situations and it is the balance of the instruction with

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[1] Hamilton Kent, Inc. a multi-product rubber extruding manufacturer, was the original manufacturer of Sorbothane in the United States. Because of the success of the product, BTR formed a stand-alone subsidiary to take over that line of business from Hamilton Kent.

which petitioners and the United States take issue. Yet in this case, the portion of the instruction set forth above negates any finding of a conspiracy exclusively between the affiliated defendants found liable for resale price maintenance. The jury was properly instructed that a parent may not conspire with its wholly owned subsidiaries. Thus, the verdict could not have been based on an agreement between BTR, Inc. and either Sorbothane, Inc. or Hamilton Kent, Inc. The verdict also could not have been based on an agreement between these two subsidiaries. They were *successor manufacturers* of Sorbothane. At no time could they have conspired with one another to maintain resale prices and there was no suggestion or evidence that they did so. In short, the jury would have to have ignored this *Copperweld* instruction to have found resale price maintenance based on a conspiracy between these BTR related defendants.

Second, the resale price maintenance instruction provided, in pertinent part:

> "Plaintiff has charged the defendants with what is called resale price fixing. Resale price fixing is illegal under Section 1 of the Sherman Act and Cartwright Acts. *It is an Agreement between firms at different levels of a chain of distribution* to set the resale prices or price ranges for production.
>
> . . .
>
> In order to win on this claim, plaintiffs must prove each of the following by a preponderance of the evidence: first, *that the defendant entered into the agreement with another distributor of the defendants' or with the plaintiff, to fix resale prices. . . .* " (Emphasis added.)

R.T. at p. 4238-4239.

Since this instruction required the jury to find an agreement between two firms at different levels in the chain of distribution, *and* between a defendant and another distributor, it is impossible for the jury to have found resale price maintenance based solely on agreement between the affiliated BTR defendants *all of which were defendants at the same level of the distribution chain.*[2] Sorbothane and Hamilton Kent were manufacturers, and BTR Inc. simply was not in the chain of distribution. It was found liable as the alter ego *of these manufacturers.* The jury therefore necessarily premised its resale price fixing verdict on an agreement between a defendant and one or more unrelated third parties.

Thus, it was impossible for the jury to have properly followed the instructions, concluded that BTR, Inc. was the alter ego of Hamilton Kent and Sorbothane, Inc. and yet come to an incorrect conclusion on resale price maintenance as a result of any error in the *Copperweld* instruction. To have done so, the jury would have had to

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[2] Note that this instruction unnecessarily precluded the jury from finding an agreement *between defendants* as the resale price fixing agreement. This perhaps explains why Spectrum was exonerated despite overwhelming evidence that it participated in the resale price maintenance plan and was of course, a distributor at a different level in the distribution chain from the other defendants. It establishes, however, that the jury could not have possibly found the requisite agreement to have been between the BTR affiliated defendants alone. The jury must have concluded, as suggested by the United States in n. 11 of its brief, that the agreement was made between the defendants and one of the other distributors not named as a defendant in the complaint.

completely ignore both the *Copperweld* and the resale price maintenance instructions.

IV

NO PURPOSE WOULD BE SERVED BY A REMAND OF THIS CASE TO THE NINTH CIRCUIT FOR ANOTHER RECONSIDERATION OF *ATLANTIC RICHFIELD*

The United States invites this Court to consider a remand to the Ninth Circuit for further review in light of the discussion of antitrust injury in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990). Yet, the United States completely fails to comment on the fact that the only assignment of error on this issue is a *procedural* one – the failure to submit this issue of law to a jury. Petitioners never properly challenged whether respondents suffered antitrust injury, and the United States acknowledges that "respondents may well be correct in arguing that the evidence in this case justifies a finding of antitrust injury under the analysis of *Atlantic Richfield*" (Amicus Curiae brief at p. 17.)

Whatever academic discussion of antitrust injury could be undertaken in some other context, the antitrust issue in this case is the erroneous claim that antitrust injury is appropriate for a jury instruction. Antitrust injury is plainly a legal issue for the court, not a fact question for the jury. Although the brief of the United States does not address this point, it is fatal to Petitioners' argument before this Court. If, as the United States appears to concede, the evidence justifies a finding of

antitrust injury in this case, no purpose is served by further review of this issue.

The Petitions for Rehearing to the Ninth Circuit were apparently given careful consideration (as suggested by the modification of the original decision on a fairly technical point.) The first and most prominent argument in support of the Petitions for Rehearing was whether the original decision should be modified in light of *Atlantic Richfield*. After nine months under submission, the Ninth Circuit apparently concluded that this Court's discussion of antitrust injury in *Atlantic Richfield* did not require a modification of the opinion or change the result in the case. While the United States believes it would have been preferable for the Ninth Circuit to explain why it rejected the fallacious argument that *Atlantic Richfield* somehow required reversal, it is clear the Ninth Circuit did that analysis and reached the correct conclusion. Absolutely no purpose would be served by having the Ninth Circuit once again reconsider its opinion in light of *Atlantic Richfield*.

As the United States points out, there is nothing incorrect about the Ninth Circuit opinion as it relates to antitrust injury. The Ninth Circuit merely states the unassailable rule of law that *harm to competition* is presumed to flow from a per se violation. *It does not state that antitrust injury is presumed to flow from per se violations of the antitrust laws.*[3] Since there is nothing incorrect about

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[3] It is noteworthy that there is no suggestion in the Ninth Circuit decision that it relied on its overrruled decision in

(Continued on following page)

the Ninth Circuit opinion, and since the Ninth Circuit already reconsidered this issue for nine months, there is no justification for remanding this case for yet another reconsideration in light of *Atlantic Richfield*. This is particularly true since, as the United States points out, the Ninth Circuit has recently followed *Atlantic Richfield* in *Datagate, Inc. v. Hewett-Packard Co.*, 941 F.2d 864, 868 (9th Cir.1991).

All of these considerations dictate against remanding this case to the Ninth Circuit for any further proceedings in light of *Atlantic Richfield*. The United States' suggestion to the contrary apparently arises not out of any conviction that the District Court or Ninth Circuit erred in the

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Atlantic Richfield (which incorrectly concluded that a presumption of antitrust injury follows from per se unlawful conduct). The opinion is not cited anywhere in the Ninth Circuit decision. Any confusion in the Ninth Circuit discussion of antitrust injury results from the confusion in the way in which the issue was framed by petitioners in their briefs. Petitioners never properly raised any substantive challenge to the existence of antitrust injury. Sorbothane, Inc., in its answering and opening brief to the Ninth Circuit at p. 44 (lines 4-8) raised only the failure to give its requested instruction on antitrust injury. Spectrum's answering and opening brief, at pages 30-31, argues the absence of antitrust injury is demonstrated by a showing that the challenged conduct "cannot be determined to have had any effect on competition." The Ninth Circuit properly answered the contention by pointing out that *harm to competition* is presumed to follow from per se unlawful conduct. It never stated that *antitrust injury* is presumed to follow from per se unlawful conduct and did not, therefor, need to modify its decision.

antitrust injury analysis or that the result would be different; rather, the United States is bothered by the Ninth Circuit's failure to mention *Atlantic Richfield*. Remanding this case so the Ninth Circuit can add a citation to an unpublished decision would cause unnecessary delay and a waste of limited judicial resources.

V

THE BRIEF OF THE UNITED STATES CORRECTLY CONCLUDES THAT THE ALLEGED *LESSIG* ERROR JUSTIFIES NEITHER REMAND NOR REVERSAL

The United States concludes the *Lessig* doctrine of the Ninth Circuit is incorrect. The merits of that issue have already been fully briefed. More important to these Petitions for certiorari, however, is the United States' conclusion that a *Lessig* error does not justify any action by this Court. The United States points out that *Lessig* is not dispositive, that the importance of *Lessig* is diminished by the *Oahu Gas* case, and that this unpublished decision does not change the state of the law in the Ninth Circuit. It is clear that any alleged *Lessig* error does not justify any action by this Court.

VI

CONCLUSION

The Petitions for certiorari should be denied since no legitimate issue is raised by Petitioners. The assignment of error on the *Copperweld* instruction would not be dispositive of all the antitrust claims and the request for a jury instruction on the antitrust issue is simply specious.

It would be a futile and time consuming exercise to either partially reverse or to remand this case to the Ninth Circuit. No issue merits a grant of certiorari, no issue merits a reversal of any kind, and no issue merits a remand. This case has been pending for almost eight years with over two of those years spent in the Ninth Circuit. Respondents respectfully request that consideration be given to whether the interests of justice will be served by further proceedings below.

Respectfully submitted,

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